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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1963

No. 13

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 1625, ET AL., *Petitioners*,

v.

ALBERTA SCHERMERHORN, ET AL., *Respondents*.

On Writ of Certiorari to the Supreme Court of Florida

## BRIEF OF THE STATE OF FLORIDA, AS AMICUS CURIAE, JOINED AND SUPPORTED BY THE STATES OF ARIZONA, GEORGIA, IOWA, KANSAS, MISSISSIPPI, NEBRASKA, NEVADA, NORTH CAROLINA, NORTH DAKOTA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VIRGINIA, WISCONSIN, AND WYOMING

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### QUESTION PRESENTED ON REARGUMENT

Whether State Courts have jurisdiction to enforce a remedy for violation of State Right to Work Laws.

## STATEMENT OF THE CASE

On June 3, 1963, this court held that Agency Shop Agreements are subject to state prohibition under section 14(b) of the National Labor Relations Act, but left for reargument the question of whether the enforcement of such a state prohibition must, in the light of the exclusive federal pre-emption doctrine,[1] be enforced by the National Labor Relations Board rather than the state courts.

This question is raised, the court pointed out, because of the interrelation between section 8(a)(3) of the National Labor Relations Act, which contains a proviso authorizing agreements conditioning employment upon "membership" in a labor union, and section 14(b) which reserves to the states the authority to prohibit such agreements. Without the proviso to 8(a)(3), the court noted, to condition employment upon union membership would be an obvious unfair labor practice under the Act, and if the effect of section 14(b) is to nullify the 8(a)(3) proviso in Right to Work states, such agreements would then become federal unfair labor practices as well as violations of the state law. In such event, the court observed, "the obvious question is precipitated as to whether a state, as well as the Board, may enjoin such union security agreements." On the other hand, the court noted, if section 14(b) and state Right to Work laws are regarded as having no impact on section 8(a)(3) at all, the pre-emption question is not presented.

The Retail Clerks International Association, petitioner herein, urges the first alternative conclusion, namely, that a state Right to Work law nullifies the section 8(a)(3) proviso, thereby making a compulsory unionism agreement a federal unfair labor practice within the exclu-

[1] *Garner* v. *Teamsters Union*, 346 U.S. 485; *San Diego Building Trade Council* v. *Garmon*, 359 U.S. 354.

sive jurisdiction of the National Labor Relations Board. Any attempt by a state court to enforce the state Right to Work law, the Union contends, would constitute an unconstitutional interference with federal authority under the *Garner* and *Garmon* rule.

## SUMMARY OF ARGUMENT

To deny a state the authority to enforce its own validly enacted laws is wholly without precedent, and is repugnant to all recognized concepts of jurisprudence, and to our constitutional system. It is illogical in the extreme to contend that while the State of Florida has authority to adopt its Right to Work amendment, and while this amendment represents a valid exercise of state authority not in conflict with federal policy, yet, the state is powerless to enforce this law through its own courts.

Whether a state Right to Work law nullifies the section 8(a)(3) proviso, and thereby converts an otherwise permissible compulsory unionism agreement into a federal unfair labor practice is purely a matter of legalistic hair-splitting. Whether it does or does not, is not decisive to the question of state authority to enforce Right to Work laws in view of the overwhelmingly clear congressional intent in the Taft-Hartley Act to leave undiminished state authority to prevent compulsory unionism. The most logical conclusion is that a state Right to Work law has no effect whatsoever upon the National Labor Relations Act, since it does not change the declared federal policy of "nonhostility"[2] toward union security agreements. Its effect is simply to make a union security agreement unlawful in the particular state under state law. The state policy is thus independent of the federal policy and

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[2] *Algoma Plywood & Veneer Co.* v. *Wisconsin Board*, 336 U.S. 301 (1949), held that section 8(3) of the National Labor Relations Act "merely disclaims a national policy hostile to" union security agreements.

can be regarded as having no impact whatever upon the section 8(a)(3) proviso.

Congress, in enacting the Taft-Hartley Act amendments to the National Labor Relations Act, never contemplated or intended that the states would be ousted of jurisdiction to enforce their Right to Work laws. The legislative history of the act shows that Congress intended exactly the contrary, and expressly indicated that federal enforcement authority should not displace state authority.

The argument made by petitioner that federal preemption is necessary to preclude a conflict in legal remedies, if not legal policy, is an artificial one. Even if, as contended by petitioner, a union security agreement in a Right to Work state is to be regarded as a federal unfair labor practice there is no logical reason why exclusive jurisdiction must be vested in the Federal Board. Concurrent federal and state jurisdiction is not incompatible with the congressional design embodied in the National Labor Relations Act, and has been recognized and applied in respect to numerous other aspects of labor management activities affecting interstate commerce, under this statute as well as others.

To hold that a state must yield its enforcement power to a federal administrative agency is to carry the federal pre-emption doctrine to the borders of absurdity. It represents a species of legal absolutism not dictated by practical and legitimate reasons, but rather by a doctrinaire notion as to the exclusivity of National Labor Relations Board jurisdiction, and blind insistence that such exclusivity must be preserved regardless of the consequent destruction of the traditional and historical right of the states to enforce their own laws.

## ARGUMENT

### I. State Right to Work Laws have no impact on Federal Policy toward compulsory unionism.

The structure of the National Labor Relations Act clearly shows that the federal policy permitting union security agreements and state policies restricting such agreements were designed to have separate and independent application at their respective levels.

The proviso in section 8(a)(3) was inserted for the sole purpose of making it clear that union shop agreements are not regarded as unfair labor practices. As was stated in *Algoma* in respect to section 8(3) of the original Wagner Act, this proviso "disclaims a national policy hostile to" union security agreements. The interpretation of the original section 8(3) in *Algoma* is still of vital importance because, save in details not here pertinent, it was framed in substantially the same way as the revised section. The wording of both provisions is essentially the same in that after prohibiting compulsory union membership in general terms, they created an exception to the general rule. The exception in the one statute is different in some details from the exception in the other. But the broad plan, the general scheme of enacting the prohibition and then creating an exception is substantially the same in each instance. In both cases there is a prohibition of compulsory union membership; in both cases there is the exception providing that nothing in the principal act or any other federal act shall preclude the making of the excepted form of agreement. Accordingly, in so far as federal policy is concerned, a union security agreement meeting the requirements of section 8(a)(3) was declared not an unfair labor practice.

Petitioner now contends that what Congress declared not an unfair labor practice at the time it passed the act may later be made a federal unfair labor practice by ac-

tion of a state Right to Work law. In other words, the state law has the effect of completely reversing the federal policy on union security agreements and creates a federal unfair labor practice where none existed before.

This result is not logically consistent with established principles recognized by this court. It has repeatedly been held that the states may not interfere with, obstruct, or otherwise hinder federal policy. How then can it be said that a state law in this instance completely reverses the federal policy on compulsory unionism agreements? It is much more reasonable and logical to hold that federal policy remains what it was at the time Congress enacted the Taft-Hartley Act amendments in 1947, and that state laws prohibiting such agreements do not change such policy but are to be applied completely independently of the federal policy.[3]

The precise question of whether a state court may enforce a state law restricting compulsory unionism has already been answered by this court in *Algoma*, which involved an order of the Wisconsin Employment Relations Board directing an employer to reinstate with back pay an employee discharged for non-membership in a union in violation of the Wisconsin Employment Peace Act. "At every stage of the proceedings," the court noted, "the company and the union contested the jurisdiction of the Employment Relations Board, on the ground of the exclusive authority of the National Labor Relations Board under section 10 of the National Labor Relations Act." After an exhautive analysis of the section 8(3)

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[3] The very wording of the section 8(a)(3) proviso compels this conclusion. The explicit words *"nothing in this act,* or in any other statute of the United States, shall preclude an employer from making an agreement with any labor organization * * * to require as a condition of employment membership therein * * *" (Emphasis added) precludes any assumption that section 14(b), or any state law adopted thereunder, makes any such agreement an unfair labor practice under the federal law.

proviso in the original National Labor Relations Act and its legislative history the court concluded that it was not the intent of Congress to deny to the state of Wisconsin the right to enforce its own more restrictive statute. The court then proceeded to discuss whether the Taft-Hartley Act amendments would require any different result. In passing upon this question the court stated:

> "Section 10(a) of the Taft-Hartley Act, which is set forth in the margin, contains important changes, but none requiring modification of the conclusions we have reached as to the corresponding section of the National Labor Relations Act.
>
> • • • • •
>
> "Other provisions of the Taft-Hartley Act make it even clearer than the National Labor Relations Act that the States are left free to pursue their own more restrictive policies in the matter of union-security agreements. Because § 8(3) of the new Act forbids the closed shop and strictly regulates the conditions under which a union-shop agreement may be entered, § 14(b), was included to forestall the inference that federal policy was to be exclusive."

On the basis of this very clear exposition of the congressional intent, the court concluded that the Wisconsin courts and the Wisconsin Employment Relations Board had full authority to issue enforcement orders under the statute.

Decisions subsequent to *Algoma* have similarly upheld authority of state courts to enforce state restrictions on compulsory unionism. *Plumbers Local Union No. 10* v. *Graham*, 345 U.S. 192 (1953), involved the propriety of an injunction order issued by a state court in Richmond, Virginia enjoining union picketing which had for its admitted purpose the dismissal of non-union employees from a construction project in violation of the Virginia Right to Work law. The court after reviewing the evidence upon which the trial court had based its finding as

to the purpose of the picketing, affirmed the judgment of the lower court. In *Willard* v. *Huffman*, 250 N.C. 396, 109 S.E. 2d 233 (1959) the Supreme Court of North Carolina sustained an award of damages to an employee discharged for non-membership in a union in violation of the North Carolina Right to Work law. The defendant employer contended that the discharge was an unfair labor practice under section 8(a)(3) of the National Labor Relations Act and thus subject to exclusive jurisdiction of the National Labor Relations Board. After reviewing the entire range of pre-emption cases under the National Labor Relations Act the North Carolina Supreme Court stated:

> "Our courts, in the case before us, are not seeking to administer the provisions of section 8(a)(1) and (3) of the Labor Relations Act, Title 29, USCA; they seek only to enforce the provisions of our own Right to Work Act, provisions which have no counterpart in the National Labor Relations Act. * * * As heretofore pointed out, our Right to Work Act has been held to be constitutional by this court and by the Supreme Court of the United States in *Whitaker* v. *State of North Carolina*, [335 U.S. 525]."

A petition for certiorari filed by the defendant employer seeking review of the decision of the North Carolina Supreme Court was denied by this court. 361 U.S. 893 (1959).

The obvious difference between these cases and *Electrical Workers* v. *Farnsworth & Chambers*, 353 U.S. 969 (1957) (per curiam); *DeVries* v. *Baumgartner Electric Co.*, 359 U.S. 498 (1959) (per curiam) and *Construction and General Laborers Union* v. *Curry*, 371 U.S. 542 (1962), wherein this court reversed state court injunctions issued ostensibly to prevent violations of Right to Work laws, is that in each of the latter cases the union conduct enjoined by the state court was such as to constitute unfair labor practices independent of any ques-

tion of the state Right to Work laws. In each case, it will be noted, the unions' petition for certiorari was based upon the assertion that the state court had improperly concluded that the purpose of the picketing was to enforce union demands which contravened state policy against compulsory unionism. In each case, moreover, the injunction order issued by the state court went considerably beyond the restriction of activities designed to bring about compulsory unionism, and broadly enjoined union picketing and related activities regardless of purpose. This, as can be seen, is quite a different state of affairs than a situation where, as in *Willard* v. *Huffman*, supra, a state court undertakes to remedy the dismissal of an employee from his job because of non-membership in a union. In such case the only question present is whether the employee was unlawfully discharged in violation of the state law. There is no question of any union conduct which might have other purposes or other effects. Similarly, in *Plumbers Union* v. *Graham*, supra, the state court had before it facts which pinpointed the union conduct as being for the sole and admitted purpose of forcing the discharge of non-union workers, and, on that basis, the authority of the state court to restrain such conduct was upheld.

In the instant case the action was originally brought by the plaintiff-employees in the Florida court for the purpose of preventing their discharge for nonpayment of union dues and fees. The case involved no union picketing or strike or any other course of action that could independently be said to be an unfair labor practice under section 8. It is thus clear that there is no similarity whatever between this situation and the situations present in the *Farnsworth*, *DeVries*, and *Curry* cases.

Petitioner relies heavily upon *United States* v. *Sharpnack*, 355 U.S. 286 (1958) as support for its contention that by operation of section 14(b) state Right to Work

laws are absorbed into section 8(a)(3), and any violation of a Right to Work law thereby becomes an unfair labor practice under the federal act. As can be seen this is a rather farfetched analogy. The *Sharpnack* case did not involve any question as to whether federal enforcement functions displaced state enforcement authority, but a completely unrelated question as to whether Congress in the Assimilative Crimes Act, 1948, could properly adopt state criminal statutes enacted subsequent to that time. In answering this question in the affirmative the court pointed out that there was a clearly expressed congressional intent to make unlawful under federal law, any conduct in a federal enclave which would be a crime under the law of the particular state. This provides no analogy to the National Labor Relations Act, however, because there is nowhere in that act an expressed congressional intent to make unlawful under federal law any conduct unlawful under state Right to Work laws. Congress could have provided that a violation of any such state laws would constitute an unfair labor practice under the federal act, but Congress has not in fact done ary such thing.

**II. Congress never intended that the States would be deprived of jurisdiction to enforce their Right to Work laws.**

The legislative history of the Taft-Hartley Act contains clear evidence that Congress intended that the states should have power to enforce, as well as enact, restrictions on compulsory unionism. House Conference Report No. 510 on H.R. 3020 stated, for example:

> "It was never the intention of the National Labor Relations Act, as is disclosed by the legislative history of that act, to preempt the field in this regard so as to deprive the States of their powers to *prevent* compulsory unionism. * * * To make certain that there should be no question about this, section 13

> was included in the House bill. The Conference agreement, section 14(b), contains a provision having the same effect." 1 Legis. Hist. 564. (Emphasis added.)

In explaining the Conference approved bill Senator Taft pointed out that the section 8(3) proviso in the original Wagner Act did not in any way limit state "enforcement" of laws prohibiting compulsory unionism, and that the amendments to section 8(3) were not intended to change this situation. He stated:

> "In other words, the whole spirit of the Wagner Act and its provisions would prohibit a closed shop, because it prohibits discrimination against people who are not members of labor unions. In order to preserve that right and to keep the Wagner Act itself from abolishing the closed shop everywhere, it was necessary to write in this proviso. But that did not in any way prohibit the *enforcement* of State laws which already prohibited closed shops.
>
> "That has been the law ever since that time. It was the law of the Senate bill; and in putting in this express provision from the House bill, we in no way change the bill as passed by the Senate of the United States." 2 Legis. Hist. 1597. (Emphasis added.)

The use of the words "to prevent compulsory unionism" and "the enforcement of state laws," in relation to the scope of state authority under section 14(b) points to the obvious conclusion that Congress intended no limitation on state power to enforce Right to Work laws.

Whether Congress intended to make state enforcement jurisdiction exclusive is not entirely clear, however, because of a number of references to concurrent state and federal jurisdiction in the portions of the legislative history dealing with the amendments to section 10(a), the section which expressly vests jurisdiction in the National Labor Relations Board to prevent unfair labor practices.

As set forth in the original Wagner Act this section provided as follows:

> "Section 10(a)—Prevention of Unfair Labor Practices. The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. Such power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise."

H.R. 3020 as it passed the House retained in section 10(a) the words "such power of the Board shall be exclusive." House Report No. 245 on H.R. 3020 in discussing section 10(a) stated:

> "As under the present act, the power of the Board under the amended act in the matter of unfair labor practices is exclusive. This rule necessitated a special provision (section 13 hereinafter discussed) to give to the states a *concurrent jurisdiction* in respect of closed shop and other union security arrangements." 1 Legis. Hist. 331. (Emphasis added.)

The language of section 10(a) as passed by the Senate contained the language of the original Wagner Act with the exception that the words "such power of the Board shall be exclusive" were stricken. The bill as finally passed by both Houses adopted the Senate version of section 10(a). The Conference Report explained the purpose of the new section 10(a) as follows:

> "The Senate amendment, because of its provisions authorizing temporary injunctions enjoining alleged unfair labor practices and because of its provisions making unions suable, omitted the language giving the Board exclusive jurisdiction of unfair labor practices, but retained that which provides that the Board's power shall not be affected by other means of adjustment or prevention. The conference agreement adopts the provisions of the Senate amendment. By retaining the language which provides the Board's powers under section 10 shall not be affected by other

means of adjustment, the conference agreement makes clear that, when two remedies exist, one before the Board and one before the courts the remedy before the Board shall be in addition to, and not in lieu of, other remedies." 1 Legis. Hist. 556.

House Report No. 245 on H.R. 3020 in explaining the section of that bill (section 8(d)(4)) which was the counterpart of section 8(a)(3) as finally adopted explained:

> "Agreements such as those that section 8(d)(4) permits are valid only if they are valid under the laws of any State in which they are to be performed, and by section 13 the United States expressly declares the subject of compulsory unionism *one that the States may regulate concurrently with the United States*, notwithstanding that the agreements affect commerce, and notwithstanding that the State laws limit compulsory unionism more drastically than does Federal law." 1 Legis. Hist. 325. (Emphasis added.)

In spite of this clear legislative record, petitioner states in its brief, "there is not a scintilla of probative evidence that Congress intended to unleash the grave consequences of concurrent state court jurisdiction on labor relations in interstate commerce." The above-quoted sections of the legislative record provide far more than a "scintilla of evidence," and, in fact, conclusively show that Congress in reserving to the states authority to adopt laws prohibiting compulsory unionism, had no intention of depriving them of their authority to enforce such laws.

### III. State Court remedies do not interfere with National Labor Policy or Board Administration

Notwithstanding that state Right to Work laws do not in themselves conflict with federal policy, petitioner contends that the application of divergent remedies by state courts would interfere with federal policy and administration. Petitioner points out that state courts may apply civil remedies by way of injunctions or damages, or crim-

inal penalties by way of fines or imprisonment, whereas the remedies applied by the National Labor Relations Board consist of cease and desist orders and orders directing reinstatement, with or without back pay. Such divergency of remedies, petitioner asserts, were condemned by this court in *Garner* as incompatible with the scheme of the federal act.

What was said in *Garner* on this subject, however, was in quite a different context. There the conduct enjoined by the state court was clearly an unfair labor practice under section 8 and within the scope of NLRB enforcement jurisdiction. The plaintiff employer brought the action in the state court in Pennsylvania, a non-Right to Work state, to restrain union picketing which sought to compel him to recognize the union and to force his employees to join the union. In spite of the admitted existence of an unfair labor practice under the federal law, the employer argued that the equity powers of the state court could be invoked to enforce state protected private rights as distinguished from the public rights which the National Labor Relations Board enforces in the public interest. In rejecting this argument, the court stated that even if distinctly private rights were enforced by the state authorities the conflict lies in remedies, not rights, since the same picketing may injure both public and private rights.

The considerations thus applicable in that case are not applicable here, since we are here dealing with different statutory provisions and with a different factual situation. Where *Garner* involved an evident unfair labor practice under the federal act, we are here dealing with union security agreements toward which Congress has expressed a policy of non-hostility and with respect to which no federal sanctions or remedies were intended. Here, also, we have a definite expression of congressional intent to permit state action "notwithstanding that the

state laws limit compulsory unionism more drastically than does federal law." 1 Legis. Hist. 325.

There are various other respects in which the National Labor Relations Act itself permits state court remedies for conduct which is clearly within the range of NLRB jurisdiction. For example, section 303 of the Taft-Hartley Act authorizes damage actions in state courts based upon union unfair labor practices arising out of secondary boycotts and jurisdictional disputes under section 8(b)(4) of the act.[4] Section 301 of Taft-Hartley authorizes state court breach of contract suits by and against labor organizations even though the conduct complained of is, not only arguably, but concededly, an unfair labor practice within the jurisdiction of the National Labor Relations Board.[5] Section 14(c)(2) authorizes state courts and agencies to exercise jurisdiction over unfair labor practices affecting commerce wherever the National Labor Relations Board has declined to assert or exercise jurisdiction.[6] Congress has authorized the Waterfront Commission of New York to exercise jurisdiction over union activities which clearly come within the protection of the National Labor Relations Act, and to apply divergent remedies. *DeVeau* v. *Braisted*, 363 U.S. 144 (1960). As there stated by the court:

> "The doctrine of pre-emption does not present a problem in physics but one of adjustment because of the interdependence of federal and state interests and of the interaction of federal and state powers. Ob-

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[4] *Longshoreman's Union* v. *Juneau Spruce Corp.*, 342 U.S. 237 (1952)

[5] *Smith* v. *Evening News Assn.*, 371 U.S. 195 (1962)

[6] "Section 14(c)(2) Nothing in this Act shall be deemed to prevent or bar any agency or the courts of any state or territory (including the Commonwealths of Puerto Rico, Guam, and the Virgin Islands) from assuming and exerting jurisdiction of labor disputes over which the Board declines, pursuant to Paragraph (1) of this subsection, to exert jurisdiction."

viously the National Labor Relations Act does not exclude every state policy that may in fact restrict the complete freedom of a group of employees to designate representatives of their own choosing. For example, by reason of the National Labor Relations Act a state surely is not forbidden to convict and imprison a defendant in a criminal case merely because he is a union official and therefore could not serve as a bargaining representative."

In *United Construction Workers* v. *Laburnum*, 347 U.S. 656 (1954) the authority of a state to apply remedies different from those applied by the Board was expressly upheld. There a state court awarded damages to an employer arising out of union picketing which was clearly an unfair labor practice under the federal act. The defendant union relied upon *Garner* in contending that the state court was without authority to apply remedies divergent from those available through the NLRB. The court in rejecting this argument distinguished the *Garner* case, as follows:

"In the Garner case Congress had provided a federal administrative remedy, supplemented by judicial procedure for its enforcement, with which the state injunctive procedure conflicted. Here Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct. For us to cut off the injured respondent from this right of recovery will deprive it of its property without recourse or compensation. To do so will, in effect, grant petitioners immunity from liability for their tortious conduct. We see no substantial reason for reaching such a result. The contrary view is consistent with the language of the act and there is positive support for it in our decisions and in the legislative history of the act."

In *International Association of Machinists* v. *Gonzales*, 356 U.S. 617 (1957) this court sustained an award of damages by a state court to an employee wrongfully expelled from his job for non-membership in the union.

The union, relying on *Garner*, contended that since the conduct complained of constituted an unfair labor practice under section 8 the state court had no jurisdiction to award damages. This court rejected that contention stating:

> "Since we deal with implications to be drawn from the Taft-Hartley Act for the avoidance of conflicts between enforcement of federal policy by the National Labor Relations Board and the exertion of state power, it might be abstractly justified, as a matter of wooden logic, to suggest that an action in the state court by a member of the union for restoration of his membership rights is precluded. In such a suit there may be imbedded circumstances that could constitute an unfair labor practice under section 8(b)(2) of the act. * * * To preclude a state court from exerting its traditional jurisdiction to determine and enforce the rights of union members would in many cases leave an unjustly ousted member without remedy for the restoration of his important union rights. Such a drastic result, on the remote possibility of some entanglement with the Board's enforcement of the national policy would require a more compelling indication of congressional will than can be found in the interstices of the Taft-Hartley Act. See *United Construction Workers* v. *Laburnum Construction Corp.*"

Similarly, *United Automobile Workers* v. *Russell*, 356 U.S. 634, (1957) upheld a state court award of damages to an employee who was denied access to his place of employment by a striking union. The union again relied upon *Garner*, claiming that the state courts should not be permitted to apply divergent remedies. As in *Gonzales* this court rejected the union contention stating:

> "In this case there is a possibility that both the board and the state courts have jurisdiction to award lost pay. However, that possibility does not create the kind of conflict of remedies referred to in *Laburnum*. Our cases which hold that state jurisdiction is pre-empted are distinguishable. In them we have

been concerned lest one forum would enjoin, as illegal, conduct which the other forum would find legal, or that the state courts would restrict the exercise of rights guaranteed by the Federal Acts.

"In the instant case there would be no conflict even if one forum awarded back pay and the other did not. There is nothing inconsistent in holding that an employee may recover lost wages as damages in a tort action under state law, and also holding that the award of such damages is not necessary to effectuate the purposes of the Federal Act."

*United Auto Workers* v. *Wisconsin Board*, 351 U.S. 266 (1956), recognized the authority of a state court to enjoin mass picketing, coercion of employees and threats of violence even though this conduct constituted an unfair labor practice under the federal act. As expressed by the court:

"The dominant interest of the States in preventing violence and property damage cannot be questioned. It is a matter of genuine local concern. Nor should the fact that a union commits a federal unfair labor practice while engaging in violent conduct prevent States from taking steps to stop the violence. This conclusion is explicit in the opinions cited in note 12." [citing *Garner*, inter alia].

It must be noted that the decision of this court in *San Diego Building Trades Council* v. *Garmon*, supra, did not overrule or otherwise disturb the rulings in *Laburnum*, *Gonzales*, *Russell*, and related cases, but rather cited these cases with approval.[7] Thus the all-inclusive condemnation of divergent state remedies which petitioner imputes to the *Garner* and *Garmon* decisions cannot really be found there.

Apart from other considerations, where is the divergency of remedies that might result from state enforcement of Right to Work laws? The most likely case where

[7] 359 U.S. 244.

the protection of the state law would be called into play is where an employee is dismissed from his job because of non-membership in a union or refusal to pay union dues or fees. In such case a state court order directing his reinstatement and recovery of lost pay is in no sense different from an NLRB order to the same effect. Or, in a case such as the present one, if an employer threatens his employees with dismissal if they fail to pay union dues and fees, a state court injunction restraining such dismissal is essentially the same remedy that the NLRB would apply by way of a cease and desist order.

In so far as state courts have authority to impose fines and imprisonment for violation of some Right to Work laws, this is unquestionably a type of sanction which goes beyond the remedies which would be applied by the Board. But it cannot be said, for that reason alone, that the state laws conflict with federal policy or federal administration, because there are no areas in which these sanctions impinge upon federal policy. As stated in *Laburnum*, supra,

> "To the extent, however, that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties or liability for tortious conduct have been eliminated." 347 U.S. 656, 665.

See, also, *Whitaker* v. *North Carolina*, 335 U.S. 525 in which this court affirmed the conviction of appellants under a warrant charging that they had violated the state Right to Work law by entering into a closed shop arrangement.

Another point stressed vigorously by the petitioner is "the real danger of conflicting findings on the same facts" if the states and the National Labor Relations Board were to have concurrent jurisdiction of Right to Work law violations. In any given factual situation, petitioner points out, a state court may construe the facts differently than

might the National Labor Relations Board and might find the existence of a violation under circumstances where the National Labor Relations Board would find no violation. This is fatuous reasoning and hardly provides a proper basis for denying state court jurisdiction. Absolute uniformity in regard to findings of facts or the application of rules of law to such facts is never possible so long as human beings are what they are. Even the vaunted uniformity of enforcement by the National Labor Relations Board is more fictional than real. It is well known that Board examiners and Board personnel differ in their approaches and outlooks and where one might find a given set of facts sufficient to warrant the issuance of a complaint, another would find the opposite. By the same token, absolute uniformity in the application of federal laws by federal courts is impossible of reality since there are 385 federal judges, each with his own individual characteristics. Some judges are known as strict judges while others are regarded as lenient, and where one might impose a severe penalty, another may, in the same circumstances, impose a relatively light penalty or no penalty at all. Consequently, the ideal of uniformity which the petitioner asserts is so necessary and desirable, is no more likely of achievement under an exclusive federal pre-emption rule than under any other rule.

Here again the petitioner seeks to apply a doctrinaire and inflexible rule of federal exclusivity when, upon analysis, it can be seen that there is no real necessity for absolute uniformity inasmuch as no federal policy will be infringed in any event, and even if such uniformity were desirable in an abstract sense, it is never possible of achievement.

In other federal statutes which spell out federal policies affecting labor and labor relations, Congress has not imposed strict pre-emption rules, and has, in fact, permitted concurrent state and federal jurisdiction. For example,

the Fair Labor Standards Act[8] which establishes minimum wages and maximum hours for employees engaged in interstate commerce provides that actions brought thereunder may be instituted in any court of competent jurisdiction, state or federal. As can be seen, a state court in considering questions of whether the provisions of the act apply to a given fact situation might reach a result different than would be reached by the Wage-Hour Administrator or by a federal court, or even by another state court. Such divergency does not, however, destroy or diminish the purposes or policies of the federal law, as petitioner claims would be the case here. It merely reflects the inherent nature of any adjudicative process. Other examples of concurrent state and federal enforcement of federal labor statutes would include the recently enacted Equal Pay for Women Act[9] and the Federal Employers Liability Act.[10]

The "grave consequences" which petitioner claims will follow from state enforcement are, as will be seen, purely imaginary. In the almost twenty years since Right to Work laws were first enacted by the states there have been no "grave consequences" attendant upon state enforcement, and there is no reason to expect that future enforcement will produce the "intolerable interference" which petitioner predicts. In any event, if any such results should occur, the argument by petitioner for a change should be addressed to Congress and not to the courts. It would be "intolerable interference" for a court to undertake by judicial fiat an amendment of the statute contrary to congressional intent.

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[8] 29 USC, sec. 201, et seq.

[9] Pub. L. No. 38, 88th Cong., 1st Sess. (June 10, 1963).

[10] 45 USC, sec. 56 "The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several states."

The fact is that no such conflict with federal administration of the National Labor Relations Act has developed. Since 1947 when the Taft-Hartley Act amendments were adopted eight additional states have elected to enact legislation to prohibit compulsory unionism in their areas. Such laws have enhanced industrial development in these states to the benefit of the working people and have been an important factor in reducing strife between unions and employers.

There is no doubt that Congress may if it sees fit circumscribe its regulation and occupy a limited field. Where it does so its intent to supersede state powers as to matters not covered by the federal legislation may in appropriate circumstances be implied. *Bethlehem Steel Co.* v. *New York Labor Relations Board*, 330 U.S. 767 (1947). With respect to union security agreements, however, there is no room for statutory implications or inferences, or for seeking out potential areas of conflict between federal policy and state enforcement. Nothing could be more evident than that Congress has deliberately and intentionally abandoned the field of the union shop and lesser forms of union security and left everything in connection therewith to the regulatory authority of the states. Having thus withdrawn from the field the federal government cannot with any logic claim to be the exclusive agency for enforcement of state statutes. The authority of the states to enact their laws cannot be separated from the conjunctive authority to enforce the laws. The entire history of jurisprudence is devoid of any example of such a separation of sovereign powers.

## CONCLUSION

For the foregoing reasons the judgment of the Supreme Court of Florida should be affirmed.

Respectfully submitted,

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